**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 **Development of Competition and Diversity in Video Programming Distribution and Carriage**	MM Docket No. 92-265

COMMENTS OF

CONTINENTAL CABLEVISION, INC.

Robert J. Sachs
Senior Vice President
Howard B. Homonoff
Director, Corporate and
Legal Affairs
Continental Cablevision
Pilot House, Lewis Wharf
Boston, Massachusetts 02110
(617) 742-9500

Frank W. Lloyd
Keith A. Barritt
**Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.**
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

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SUMMARY

Continental Cablevision, Inc. ("Continental"), the third largest cable system operator in the United States, and an investor in several program services, urges the Commission to consider carefully the consequences to the continued development of innovative programming choices in crafting its program access rules under Section 616 and 628 of the 1992 Cable Act. Both Congress and the Commission have recognized that cooperation between cable programmers and cable distributors has helped to create a rich diversity of programming that neither the 1992 Cable Act nor the Commission's rules should stifle.

The focus of the 1992 Cable Act's provisions on program access is on harnessing the anticompetitive power of certain vertically integrated entities. The FCC's rules should reflect that it is only where a cable operator actually exercises control over a programmer in a way that significantly hinders or prevents other multichannel video providers from fairly competing that Section 628 should apply. These statutory provisions have a far different, narrower goal than that of the attribution standard used for broadcast multiple and cross-ownership rules, which is to promote a greater diversity of programming and viewpoints. The Commission should resolve the Act's ambiguity to make clear that the limits on both satellite cable and satellite broadcast programmers apply only to vertically integrated entities.

In recognition of marketplace realities, the FCC's rules should consider factors other than those enumerated in Section 628 when determining if programming price differentials are justified, including: 1) the distributor's penetration level for premium programming, 2) the distributor's marketing resources devoted to program promotion, 3) the attractiveness of the markets served by the distributor, 4) the channel position provided by the distributor, 5) the size of the distributor's subscriber base, 6) the distributor's use of addressable converters, and 7) the distributor's retail price to the consumer.

Continental's experience as a 50% owner of New England Cable News demonstrates that a two year maximum for exclusive distribution contracts, as suggested by the FCC, is insufficient to create the incentives necessary to adequately market a new programming service. New England Cable News provides 24 hour coverage of issues of regional importance, including live coverage of breaking local and regional news not available on any other broadcast or cable channel. It is precisely the sort of public affairs-oriented programming the Commission has traditionally encouraged. After almost a year of operation, however, New England Cable News continues to lose money, with no immediate prospects for profitability. Without an adequate start-up period some distributors might be unwilling to carry or promote such programming if other distributors could soon "free ride" off their marketing efforts. Continental therefore recommends that exclusive distribution contracts of at least seven years be allowed for new program services.

Section 616's provision for a remedy of mandatory carriage of programming where a distributor has extorted a financial interest in programming, coerced a programmer to provide exclusive distribution rights, or discriminated against an unaffiliated programmer should only apply where a programmer demonstrates unlawful conduct by a distributor, measured by the same standards that apply to a programmer's conduct in Section 628. Failure to properly limit the extreme remedy of mandatory carriage can only skew the programming choices of distributors and disserve the needs of subscribers. This is a form of forced speech, raising serious constitutional issues, and should be applied only in rare instances.

The nation's television viewing public has benefitted from the varied tapestry of programming choices available on cable television. The Commission's rules should promote continuation of healthy investment by video distributors in video programmers, not smother it.

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COMMENTS OF CONTINENTAL CABLEVISION, INC.

__Introduction__

Continental Cablevision, Inc. ("Continental"), the third largest cable system operator in the United States, and an investor in several program services, submits its comments on several important issues raised in this proceeding. Continental believes that the program access rules the FCC adopts will have broad implications for the television viewing public, many of which will not be fully known or understood for some time. Continental therefore urges the Commission to adopt rules that will preserve the many benefits that consumers have come to enjoy from innovative programming choices that would not exist but for historical legitimate investment relationships between programmers and distributors of cable television programming. The FCC should adopt rules, such as those contained in the Appendix to these comments, that will encourage cable operators such as Continental to continue to make programming investments in the future.

Continental owns small, fractional interests in several program services. For example, when Turner Broadcasting System, Inc. needed financial assistance, to remain a vigorous supplier of diverse news, sports, information and entertainment to the public, Continental contributed capital entitling it to 2.01% of Turner's Class B common stock. Likewise Continental holds convertible preferred stock in E! Entertainment Television that would provide it with 10.85% of the company's equity upon conversion. Continental also holds minority, non-controlling investments in regional sports networks in Florida and Minnesota, in QVC Network, Inc., a home shopping channel, and in Viewers Choice Pay Per View Network. The only program service in which Continental is in a position to exercise actual control is New England Cable News, a 24 hour regional news service, where it holds a 50 percent general partnership interest with the Hearst Company.

Continental's comments herein will be focused principally on Section 19 of the 1992 Cable Act,[1/] which adds a new Section 628 to the Communications Act. This section is designed to foster competition among multichannel video programming

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[1/] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (the "1992 Cable Act" or "the Act").

distributors by prohibiting cable operators, "satellite cable programming vendors" in which an operator has an "attributable" interest, and "satellite broadcast programming vendors"[2/] from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing . . . programming to subscribers or consumers."[3/]

I. A Cable Operator Should Have The Actual Ability To Control A Programmer's Behavior Before It Is Deemed To Have An "Attributable Interest" In That Programmer

In order to implement Section 628, the Commission has asked how to measure when a cable operator has an "attributable" interest in a programmer.[4/] The 1992 Act itself does not

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2/ Section 628(i)(2) defines a "satellite cable programming vendor" as "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor."

Section 628(i)(4) defines a "satellite broadcast programming vendor" as a "fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming," i.e. a satellite carrier providing network and independent broadcast "superstation" signals.

These comments will use the shorthand term "programmer" to refer to both a "satellite cable programming vendor," and a "satellite broadcast programming vendor."

3/ Section 628(b).

4/ NPRM at ¶ 9 ("[i]n order to determine whether a cable operation is vertically integrated under the 1992 Cable Act, we must establish a threshold at which an ownership interest will be considered attributable").

define an "attributable interest." Nor does the House version of the bill, which was adopted by the Conference Report.[5] The Senate Report, however, states that the FCC may use any criteria it deems appropriate.[6]

The Cable Act's focus on actual anticompetitive behavior suggests that the Commission should adopt a narrow standard to determine when an "attributable interest" exists. Simply adopting the five-percent threshold of outstanding voting stock applied in the case of the broadcast industry's multiple station ownership and cross-ownership rules would fail to take into account the unique circumstances of the historical relationship between cable operators and programmers. A simplistic ownership benchmark would unfairly penalize those program services where the intent of cable operators has been solely to be truly passive investors to stimulate new program services. As both the Congress and the Commission have recognized, investment and joint-venturing by cable operators with programmers has enabled the cable industry to provide innovative new programming to consumers that otherwise would likely never have materialized.[7]

5/ See NPRM at ¶ 9.

6/ S. Rep. No. 92, 102d Cong., 1st Sess. 78 (1991) ("Senate Report"); see also NPRM at ¶ 9.

7/ See NPRM at ¶¶ 5, 7.

In order not to stifle such investment, the statute and the Commission's rules should apply only where a cable operator exercises sufficient control over a programmer such that it can "hinder significantly or prevent" other "multichannel video distributors" from providing programming to consumers.[8/] This is consistent with the purpose of the attribution standard in this portion of the Act.

Adopting an attribution standard drawn solely from the FCC's broadcast multiple or cross-ownership rules would fail to recognize the far different purpose of such rules. The goal behind the broadcasting rules is to foster diversity of ownership of mass media, and thereby increase the diversity of programming offered over different broadcast outlets or other media outlets in a community or nationwide.[9/] This portion of the 1992 Cable

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[8/] Section 628(b).

[9/] See Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 97 FCC2d 997, 999 (1984), recon., 58 RR2d 604 (1985), further recon., 1 FCC Rcd 802 (1986), noting that the FCC's "fundamental purpose" in adopting multiple ownership rules was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints" (cite omitted).

Although another purpose of those rules was to prevent "undue concentration of economic power," id., it is horizontal concentration of power that the Commission is concerned with in broadcasting, in order to promote diversity of programming choices by different media outlets in these same community. By contrast, for purposes of program access, the FCC is seeking to promote the availability of the same programming choices, albeit through different distributors in the same community, by limiting the vertical concentration of economic power. The level of control that is necessary to exercise enough power to thwart (continued...)

Act, in contrast, more narrowly requires the Commission to design regulations to "prevent a cable operator which has an attributable interest in a [programmer] from unduly or improperly influencing the decision of such [programmer] to sell, or the prices, terms, and conditions of sale, of . . . programming to any unaffiliated multichannel video programming distributor."[10/]

In the absence of control by a cable operator over a programmer, it cannot "unduly or improperly influence" its decisions. It makes no sense to taint a program service where a cable operator's ownership interest meets a rigid benchmark, but where its voting power is hopelessly overwhelmed by an independent investor who has absolutely no incentive to withhold program product from a competitor to the cable operator, and in fact has every incentive to maximize the number of outlets for the program service. Questions of when a certain level of "control" resides in one person or group are nothing new to the Commission, as its long history in dealing with allegedly

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[9/](...continued) competition should be measured by a different standard than broadcasting's simple benchmark that is designed to promote diversity of ownership irrespective of the amount of control actually exercised.

[10/] Section 628(c)(2)(A) (emphasis added). See also NPRM at ¶ 9.

unauthorized transfers of control attest.[11/] Continental encourages the Commission to follow its own suggestion for implementing this Section of the Act by establishing "behavioral guidelines to determine control irrespective of the attribution threshold."[12/]

At a minimum, the Commission's "attributable interest" standard should exempt those affiliations between cable operators and programmers in which a single person or entity (other than the cable operator) has a 51% or greater voting share in the programmer. The FCC rules should also exempt situations where the cable operator holds limited partnership interests, non-voting stock, or other interests not deemed attributable under the FCC's broadcast attribution rules. In such cases, the cable operator has no legal ability to exercise any control whatsoever over the programmer.

In other cases, the Commission should allow a showing by the cable operator that it does not exercise sufficient control to exert "undue or improper" influence in the decisions of the programmer that are causing the act or practice alleged to have

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11/ See, e.g., McCaw Cellular Communications, Inc., 4 FCC Rcd 3784 (1989); News International, PLC, 97 FCC 2d 349 (1984); Stereo Broadcasters, Inc., 87 FCC 2d 87 (1981), recon. denied, 50 RR 2d 1346 (1982); WWIZ, Inc., 36 FCC 561, recon. denied, 37 FCC 685 (1964), affid sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

12/ NPRM at ¶ 9.

significantly hindered or prevented another "multichannel video distributor" from providing programming to consumers. This would demonstrate that a cable operator's degree of interest is not "attributable." Such a rule would mirror the statutory focus on actual operator control over the programmer and actual ability to force the programmer to engage in anticompetitive behavior, rather than an abstract benchmark based on ownership interest alone.

II. The Restrictions Of Section 628 Apply Only To Vertically Integrated Entities

The FCC is correct that as to satellite cable programmers, the aim of this section of the Act unambiguously is to cover only those programming entities that are vertically integrated with cable operators. Despite the fact that the wording of Section 628(b) is not specific as to whether it applies to <u>any</u> satellite <u>broadcast</u> programming vendor, vertically integrated or not, the only logical reading of the Act is that this section also applies only to vertically integrated entities.

As the Commission has recognized, "[f]rom the structure of Section 628 as well as the legislative history, it appears that Congress's concerns were particularly focused on vertical ownership relationships in the cable industry."[13/] The

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[13/] NPRM at ¶ 7. <u>See also</u> NPRM at ¶ 8 (noting that Section 628's "emphasis [is] on vertically integrated entities"); H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 40-41 (1992); Senate Report at 24-29.

Commission also recognized that subsections of this section are internally inconsistent, as Section 628(c) (unlike Section 628(b)) contains several references to satellite broadcast programming vendors "in which a cable operator has an attributable interest."[14/] In addition, the Conference Report unequivocally states that "[s]atellite broadcast programming vendors are to be held to the same standards as the programming vendors to whom this section applies."[15/]

Continental believes the intent of Congress is clear on this point, and that the Commission should resolve this statutory inconsistency by following the language of the Conference, House, and Senate Reports. The Commission's rules, therefore, should be applicable, across the board, only to vertically integrated programmers. Despite the technical inconsistency in the final version of the bill, there is nothing at any stage of the legislative history to suggest that Congress intended to single out nonvertically integrated satellite broadcast programming vendors as being subject to the Act's restrictions. Instead, as noted above, the legislative history states just the opposite -- that vertically integrated entities are the ones which should be subject to special restrictions, and that satellite broadcast

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14/ See Section 628(c)(2)(A), (C), and (D). The Commission has even characterized Section 628(c)(2)(B) as applying to a "programming vendor that is vertically integrated with a cable operator." NPRM at ¶ 15.

15/ H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992).

programming vendors should not be treated any differently than other programmers.

III. The Commission Should Allow A Number Of Marketplace Factors To Be Considered In Evaluating Price Differentials

Section 628(c)(2)(B) requires the Commission to prohibit a vertically integrated programmer from discriminating in prices, terms, and conditions of sale or delivery of satellite programming among or between "multichannel video programming distributors or their agents or buying groups."[16/] However, the statute specifically allows such a programmer to treat buyers differently in certain circumstances, including establishing different prices, terms, and conditions that take into account actual and reasonable differences in the financial characteristics and services offered by competing distributors, the cost of creation, sale, delivery, or transmission of programming, and economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor.[17/]

The Commission has asked for comment on how to identify legitimate business behavior that may occur in the video program distribution marketplace that could cause price

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16/ See NPRM at ¶ 15.

17/ Section 628(c)(2)(B)(ii)-(iii).

differentials.[18/] The Commission also asks whether it has the authority to consider factors other than those listed specifically by the statute.[19/] Because the statute requires the Commission to prohibit only those price differentials which are "discriminatory," the Commission clearly has the authority to consider any economic conditions that lead to price differentials that are not discriminatory, even if such conditions are not specifically listed within the statute.

In addition to the factors specifically listed in the statute and the NPRM, Continental recommends that whenever any of the following seven factors has a material impact on the price paid by a multichannel video distributor (or its agent or buying group) for a programming service, the FCC should presumptively consider the price differential to be justifiable and nondiscriminatory:[20/]

A. Distributor's Penetration Levels for Premium Programming

Cable programmers sometimes offer multichannel video distributors a discount for premium programming (i.e. programming purchased by the consumer on a per-channel basis) based on the

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18/ NPRM at ¶ 15, 18.

19/ NPRM at ¶ 18.

20/ Of course, where the same factor exists equally as to a competing multichannel video distributor, such a factor could not justify offering one distributor a discount but not the other.

number and percentage of subscribers who purchase the programming through that distributor. Such an arrangement is a legitimate reaction to market forces and should be allowed to continue.[21/] It provides a distributor with an incentive to market and promote the programming in order to lower its own costs. Programmers benefit because their overall subscribership (on which their revenues are ultimately based) is increased. And because the service offered is offered on a per-channel basis, consumers have complete freedom to choose whether or not to subscribe to the particular programming.

For example, programmers such as HBO, Showtime, and Disney have been willing to offer multi-channel video distributors advantageous wholesale pricing terms in order to encourage video distributors to achieve greater market penetration. It is obviously to HBO's or Showtime's substantial advantage to penetrate 50% of the market rather than 25%. Achieving that objective depends significantly on the ability and willingness of the multi-channel video distributor to commit the resources to achieve superior sales results.

Greater penetration results in cost efficiencies for both programmer and local distributor which ultimately benefit the

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[21/] The Commission specifically identified the situation where a discount is offered for performance in marketing a service to subscribers as one that might cause a legitimate price difference between multichannel video distributors. See NPRM at ¶ 18.

consumer. Since the premium programming marketplace is highly competitive, other pay programmers typically seek to improve their offerings or encourage local distributors to lower retail prices to maintain or increase market share. Again, the consumer is the beneficiary of these forces.

B. Marketing Resources Devoted to Promotion of Premium Programming by the Distributor

Rather than having a discount for the cost of programming be based solely on actual marketing results, programmers and multichannel video distributors should be able to negotiate discounts based on the distributor's guarantee to commit resources to the marketing and promotion of a programming service. The incentives are the same as noted above where the discount is based on actual market penetration, only the parties agree that the promise itself of an effort to market the service is of sufficient pecuniary benefit to the programmer that a lower price to the distributor is warranted.

Similarly, those programming distributors who have already invested their resources in marketing and promoting the same or other programming services should be entitled to realize some of the benefits of those past or current efforts in the form of lower prices for programming. Either the programmer has already benefited if the distributor's past efforts pertained to the programmer's services in particular, or it stands to benefit from the distributor's experience and success in promoting other services. Thus discounts based on a distributor's demonstrated success in marketing particular services should also be expressly allowed under the Commission's rules.

It is widely recognized in the industry that some cable operators are better marketers than others. In this regard, the cable industry is no different than consumer electronics, packaged goods, or automotive companies. There are many reasons for these differences. Some operators allocate a greater percentage of revenues to marketing, some are highly centralized, others are regionalized, some maintain a range of marketing specialists, spend significantly on research to understand customer needs, and so on. Programmers recognize these varying capabilities and commitment to marketing their products locally. Historically, they have been willing to strike more favorable business arrangements with local distributors who will do the best job of marketing the product.

If anything, the need to encourage "extra effort" or "preferred" marketing by local distributors will increase in the coming years as consumers are faced with 100-200 channel offerings, differing packages, increased a la carte offerings and a range of local multi-channel video distributors. Programmers need the flexibility to structure different business arrangements and terms to take advantage of local marketing efforts by an operator. They should be free to make these legitimate distinctions.

C. Markets Served by the Distributor

For programming services that are at least partially advertiser supported, a distributor that serves an area that is a desirable target market for advertisers should be entitled to realize some of the financial benefit to the programmer associated with providing that service to the market. For example, subscribers who reside in suburbs of Boston, Chicago, and Los Angeles are likely to represent demographically attractive markets to an advertiser-supported programming service.

Distributors that serve markets that the programmer and distributor agree contain consumers that are more likely to subscribe to the service, because of that market's particular demographics, should be able to receive a discount. For example, a Hispanic advertiser-supported service might be willing to provide a discount to a cable operator in an area with a larger Hispanic population than another. Such a discount represents recognition by the programmer that it gains some financial benefit from the unique demographics of the distributor's market. As long as a competing distributor serving the same market is eligible for the same discount, there is no element of discrimination involved in permitting discounts in such markets.

Cable programmers, particularly those who generate revenues through the sale of national advertising, have long recognized the importance of certain markets and have structured business arrangements to stimulate or maintain distribution in these markets. This is a rational business decision freely made by programmers to make their product more attractive to advertisers. (The Commission would certainly not restrict CBS' or another network's ability to offer inducements to obtain station affiliations in key markets with certain stations that further its broad audience objectives.)

In this age of micro marketing, advertisers are willing to pay a premium to reach their target audience (whether it be luxury car prospects or users of fishing equipment). One of the strengths of cable is its ability to offer the merchandiser a more efficient way to reach his target. Cable programmers are, in part, in the business of assembling markets. They should be free to structure their business dealings -- including pricing to distributors -- to make that effort as efficient as possible.

D. Channel Positioning

Cable programmers (as well as broadcasters) have long recognized the importance of channel position on the dial. Ample evidence abounds from programmers indicating that preferred channel position can increase viewership substantially. Home shopping services, with their ability to display "instant ratings," place a very high premium on channel position.

As channel capacity and program offerings expand in the future, operators will likely experiment with a range of channel positioning strategies. Programmers should be free to develop business arrangements that create the opportunity to position their product favorably in a demanding and competitive channel environment.

A distributor who offers a programming service a favorable channel position provides a pecuniary benefit to that programmer, and should therefore be entitled to a discount on the cost of the programming provided.[22/] Favorable channel positioning may increase viewership (which is particularly important to advertiser-supported services), thereby increasing revenues for the programmer. Because favorable channel positions are a finite resource, where a distributor provides such a position to one programming service it is obviously prevented from making that position available to another. Thus a discount given by a

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[22/] Whatever rules the Commission adopts here regarding channel positioning must of course be consistent with the rules applicable to the carriage of local broadcast stations that the Commission ultimately adopts in its separate must-carry rulemaking. See Notice of Proposed Rule Making, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-259 (rel. Nov. 19, 1992).

programmer for the distributor's commitment of a valuable resource should be permitted by the Commission's rules.

E. Size of the Distributor's Subscriber Base

The Commission has recognized that the number of subscribers served by a particular distributor might lead to legitimate discounts in the price of programming.[23/] Economies of scale allow a distributor that serves more subscribers than another to provide new programming at a cheaper cost per subscriber. Because of the efficiencies inherent in managing a larger system, fewer employee hours per subscriber are required to be invested to market, promote, and distribute programming, which in turn increases the availability of the programming to the public. Such increased availability is a pecuniary benefit to the programmer (for both advertiser-supported and premium services) for which programmers and distributors should be allowed to negotiate a discount.

Price differentials attributable to volume are well established in a wide range of industries and they should remain available to multi-channel video providers. The fundamental rationale for this differential is economic efficiency. If a programmer can achieve savings and therefore create economies over a broad range of business activities including distribution, sales, advertising, promotion and marketing, administration,

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[23/] NPRM at ¶ 18.

billing, and collections, then such price differentials ought to be justified.

In particular, the affiliate sales and marketing process has become complex and time consuming for both established and new programming networks. Many of the costs associated with these business functions -- particularly for newer or start-up operations -- have a sizeable fixed cost component. It only makes sense that the larger the number the revenue generating units -- in this case subscribers -- and the faster those units are acquired, the more rapidly a programmer can move to profitability and re-invest excess revenue in product improvement.

Directly related to the larger size of the distributor's subscriber base are benefits from lower programmer transaction costs. A programmer can clearly reap substantial transaction cost savings by negotiating a single contract for carriage with a large distributor that guarantees a broad subscriber base. By comparison, a programmer is forced to spend far more, if it must negotiate a series of contracts with separate small scale distributors to compile the same subscriber base. The larger distributor is fully justified in capturing a portion of these programmer cost savings for itself and its customers in return for the carriage agreement.

F. Addressability of the Distributor's System

The use of addressable converters by a distributor also helps to lower the cost of program distribution, particularly for premium services. Continental is an industry leader in the use of addressable converters. Over 70% of Continental's systems employ addressable technology, and fully one-half of Continental's subscribers are outfitted with addressable converters. We have experienced the unique efficiency this technology provides in allowing a distributor to make additions to its service offerings without the expensive and time consuming process of installing or removing subscriber traps.

Certainly, in the absence of addressable technology, there is a significant time lag in providing a new service to subscribers. Distributors who have invested in addressable technology increase the availability of programming to the public, and they should be allowed to negotiate with programmers to gain a discount for the benefits that such addressability provides to programmers. This is especially true with respect to premium and pay-per-view programming.

G. Retail Price Charged to the Consumer

Some programmers, believing that this will drive penetration, place a very high premium on low retail pricing to the consumer. In order to encourage operators to offer low retail prices, or place their service on a low priced tier,